HIA Submission

Off-the-Plan Contracts and Obsolete Restrictive Covenants | Consultation on the Proposed Reforms

To the Office of the Registrar General

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Introduction

The Housing Industry Association (HIA) takes this opportunity to respond to the Discussion Paper (Paper) on the review of Contracts and Covenants released by the Office of Registrar General on 22 January 2025. The Paper explores potential reforms to laws governing off-the-plan contracts and covenants.

Part A: Off-the-Plan Contracts

Given that off-the-plan developments account for a significant share of NSW's residential property market (comprising nearly half of all new dwellings), any regulatory changes must be carefully considered.

In practice, most off-the-plan projects progress as intended, meeting buyers' expectations and contributing to housing supply. Developers play a vital role in the supply of housing and should be supported in order to deliver high-quality housing outcomes.

While HIA does not condone the misuse of sunset dates or delay event clauses, it is essential that reforms strike the right balance. Overly restrictive regulations could increase compliance costs, reduce flexibility, and discourage investment and innovation, adding unnecessary complexity to an already highly regulated industry while undermining broader government efforts to address housing shortages and affordability.

HIA advocates for a balanced regulatory approach that ensures consumer protections without imposing undue administrative burdens. Regulatory changes should strengthen confidence in the off-the-plan market, not hinder its competitiveness or growth.

Executive Summary

Existing laws

HIA notes that the Paper focuses on introducing a range of measures to tighten contract laws aimed at giving *"buyers more transparency and realistic expectations about the timing and risks associated with a project".* The Paper also proposes *"strengthening protections around the use of sunset clauses, preventing developers from extending sunset dates indefinitely so that buyers have more certainty in the contract process".*

However, prior to the release of this Paper, HIA notes that the NSW property and conveyancing laws have already undergone multiple significant reforms in recent years, including:

- 2015 Reforms: In response to concerns about developers misusing sunset clauses to terminate contracts and resell properties at higher prices, the *NSW Conveyancing Act 1919* (the Conveyancing Act) was amended, introducing Section 66ZL, which imposed stricter controls on the use of sunset clauses.
- 2016 Review & 2017 Amendments: The NSW Government's Discussion Paper on the *Conveyancing (Sale of Land) Regulation 2010* led to additional regulatory changes that took effect in September 2017.
- 2019 Off-the-Plan Reforms: Further strengthening buyer protections, the 1 December 2019 amendments to the Conveyancing Act introduced greater transparency, improved disclosure requirements, and enhanced consumer rights in off-the-plan contracts.

Additionally, existing consumer protection measures under various state laws and the Australian Consumer Law (ACL) already provide significant safeguards for buyers.

While clarity and certainty in contract law are important, HIA is concerned that further ad hoc amendments may result in a piecemeal and reactionary approach to regulation. Any further changes to conveyancing laws should be evidence-based, addressing a clear and demonstrable market failure, rather than imposing additional red tape and compliance costs on businesses without justification.

Delay caused beyond developer's control

While we acknowledge the intent behind additional laws and measures to enhance consumer protections, it is important to recognise that delays in off-the-plan developments are not always attributable to developers or unforeseen external events. A significant factor in project delays can be the involvement of third parties, including financiers, state infrastructure agencies, and other regulatory bodies.

For example:

- Financiers may impose unexpected conditions or delays in funding approval, impacting the ability to progress a development within the anticipated timeframe.
- State infrastructure and utility providers may take longer than expected to complete necessary works, such as road upgrades, water, and electrical connections, delaying the finalisation of projects.
- Council and state planning processes can also contribute to extended timelines due to evolving regulatory requirements or unforeseen administrative delays.

While consumer protection is a critical consideration, any reforms must also take into account the commercial and practical realities of delivering off-the-plan developments. Overly rigid constraints or penalties may unfairly impact developers when delays arise due to factors beyond their control.

HIA encourages a balanced approach that recognises the shared responsibility across multiple stakeholders in the development process and provides flexibility where delays are caused by third parties.

Should these proposals be progressed mandating additional requirements for builders, the regulatory frameworks should incorporate mechanisms to account for unforeseen circumstances (such as infrastructure delays, council approvals, financiers' requirements, etc) ensuring that developers are not unfairly penalised for factors outside their control.

Unprecedented delays in Infrastructure

Currently in NSW, there is a shortage of available 'shovel ready' land, which is contributing to developers and builders being unable to progress and complete works. In Sydney alone, the cost of shovel-ready land has surged to levels double those of other major capitals, posing challenges to efforts aimed at increasing home construction. The supply of land is a significant contributing factor to pressure on building and development businesses, with the prolongation of project timeframes leading to additional costs and pressure on relationships with consumers.

There are various contributing factors to this shortage, and one in particular being unprecedented delays in the provision of water services and power to sites, in addition to delayed upgrades to existing infrastructure. HIA has raised this issue with Government and again reiterates the need for urgent action. The NSW Government has acknowledged these issues and established a cross-government team to expedite water and wastewater infrastructure approvals, aiming to keep developments on track and accelerate home

delivery.

Additionally, HIA notes that the Paper fails to identify issues relating to providing common infrastructure in residential developments. HIA highlighted that developers are not solely responsible for delays in infrastructure delivery. Governments have a responsibility to implement infrastructure programs to sustainably support anticipated growth in a manner that ensures the investment cost is shared equitably across the whole community. Infrastructure provision should be planned, developed, and implemented in a coordinated manner by all levels of government, state, regional and local, in consultation with the residential building and development industry.

Supporting data for increased measures

In HIA's view, any additional laws should be implemented only to address clearly identified market failures. However, the Paper lacks strong evidence and rationale for imposing further regulations on developers. HIA does not support additional regulation unless a specific issue is clearly defined, assessed in consultation with the industry, and determined to require intervention. Since the introduction of previous reforms, there should be a clear analysis of whether the number of improper contract rescissions has increased, decreased, or remained stable. HIA would like to see this data which is crucial in determining whether further intervention is necessary and, if so, what form it should take.

Additionally, before introducing new laws that penalise developers for non-compliance, it is essential to assess whether the existing reforms have been effective. Any additional regulatory measures should be based on compelling evidence and data rather than assumptions about developer behaviour.

Targeting the Right Issues

It is essential to recognise the realities of the commercial environment and broader society. While a small minority may engage in non-compliant behaviour, the vast majority of industry participants operate lawfully, pay contractors on time, and prioritise compliance. Imposing excessive obligations on compliant businesses to address unethical behaviour is neither fair nor practical. Furthermore, those who adhere to the law should not be penalised or punished for those who operate in bad faith.

In addition, the Paper is also silent on circumstances in which developers are failing to meet their obligations. As such, it is unclear:

- what evidence there is of widespread issues with developer conduct; and
- what evidence there is that any specific kind of additional regulation will meaningfully improve developer behaviour to the extent that justifies the costs and burdens of those regulations.

The importance of buyer education

Purchasing off-the-plan is by its very nature speculative and requires contracts with certain terms and conditions. Whilst some buyers may assume they have bought a block of land, they have not. They have acquired a conditional promise from a developer to produce and deliver a block of land or a unit in a strata development.

Buyers and developers have the freedom to negotiate contract terms, including capping the number of extensions and setting a maximum extension period. However, understanding and effectively negotiating these terms requires careful consideration.

To make informed decisions, buyers should thoroughly review contract terms and seek expert legal advice before signing. Engaging a specialist property lawyer rather than relying solely on a conveyancer can provide greater protection, as off-the-plan contracts often involve complex clauses, legal risks, and potential disputes. Key issues, such as sunset date provisions and extension rights, require a higher level of legal expertise to navigate effectively. Without proper guidance, buyers may face unexpected financial and legal challenges.

Response to the Questions

Part A: Off the plan contracts

Expanded disclosure

Development milestones

1. ***Should the Disclosure Statement be expanded to require status information about development milestones? If so, what milestones should be disclosed?***

2. ***Should the developer be required to provide updates as development milestones are met? If so, what time period for notification do you think would be appropriate?***

HIA acknowledges the importance of transparency and fairness in ensuring buyers have access to relevant information. However, HIA is concerned that expanding disclosure requirements to include development milestones may place an undue administrative burden on sellers, potentially leading to delays and increasing the risk of buyer hesitation or withdrawal.

Mandating regular updates on delays in off-the-plan property developments would be resource-intensive, requiring developers to systematically gather, verify, and distribute accurate information to all stakeholders. This added complexity could create uncertainty within the development process, particularly as construction delays are often outside the developer's control.

While keeping buyers informed has clear benefits, it is essential to strike a balance between transparency and the practical challenges of implementation. The availability and reliability of milestone-related information must be carefully considered to avoid introducing unnecessary regulatory complexity.

Notably, some developers have already adopted voluntary practices of providing milestone updates, demonstrating that effective communication can be achieved without additional legislative requirements.

Ultimately, clear and consistent communication between developers and buyers remains key. HIA supports a practical approach that enhances transparency without adding unnecessary regulatory burdens to the development process.

Developer owning the development site

3. ***Should the developer disclose their ownership status of the development site in the contract? If so, should the developer also be required to set out the basis upon which they expect to become owner?***

No, this disclosure is unnecessary, as the ownership status of the development site is already ascertainable

through a title search, which is a mandatory component of the Contract of Sale.

4. ***How do you think the disclosure in Question 3 above could best be achieved? For example, in the Disclosure Statement, as a prescribed term of the contract, or in some other way?***

As noted in the response to Question 3, additional disclosure is unnecessary. The Contract of Sale already includes a title search, which provides this information.

5. ***If the developer has not provided a warning statement or disclosed that they do not own the land, what action should the buyer be able to take? For example, rescind within a certain time after exchange of contracts, at any time before completion, or at any time before the developer becomes the owner of the land, or some other remedy?***

HIA does not support the introduction of a buyer's right to rescind a contract based solely on the absence of a warning statement or disclosure that the developer does not yet own the land. Such a measure would simply add unnecessary complexity and unpredictability in off-the-plan transactions/to the property development process, potentially impacting and disrupting overall project viability, increasing costs, and impacting housing affordability, especially given that construction delays are often beyond the developer's control.

It is common for developers to enter into contracts before formally acquiring the land, particularly in larger developments where settlements occur in stages. This is a standard commercial practice that enables project viability, financing arrangements, and the timely delivery of housing supply. Introducing a broad rescission right in these circumstances could create market instability, deter investment, and further escalate project costs.

Existing legal frameworks already provide buyers with protections, including contractual remedies for misleading or deceptive conduct.

Rather than imposing additional regulatory burdens that may have unintended consequences, HIA supports a balanced approach that maintains consumer protections while ensuring the continued viability of off-the-plan developments.

However, if this proposal is pursued, any rescission rights granted to buyers should be proportionate and not excessively broad, as an unrestricted right to rescind would be an unreasonable and disruptive measure.

Sunset clauses

Mandatory sunset clauses and expanded sunset events

6. ***Should the definition of 'sunset event' be expanded to include other events, requiring Court approval to terminate contracts?***

HIA does not support expanding the definition of a 'sunset event' to include additional events that would require Court approval to terminate contracts. Such a measure would introduce unnecessary legal and administrative burdens, increase costs, and create significant delays in project delivery.

Sunset clauses serve a critical function in off-the-plan contracts, providing certainty for both developers and buyers by allowing termination in circumstances where a project cannot proceed within a reasonable

timeframe. Expanding the scope of sunset events and requiring court intervention would reduce flexibility, discourage investment in off-the-plan developments, and ultimately contribute to housing supply constraints.

HIA does not condone the misuse of sunset clauses and acknowledges that disputes should be resolved through legal channels. Existing legislative safeguards already regulate the use of sunset clauses, ensuring developers do not terminate contracts unfairly or without cause. For example, section 66ZL of the Conveyancing Act already requires developers to seek Supreme Court approval before terminating a contract under a sunset clause.

Buyers are also protected under consumer law provisions and contractual rights. Further restrictions would add complexity without delivering any meaningful benefits to consumers.

At this stage, HIA sees no compelling reason to amend the current approach.

Additionally, HIA questions whether Supreme Court proceedings are the most efficient or effective first-instance mechanism for resolving such disputes. Instead, HIA would support consideration of an independent body (excluding the New South Wales Civil and Administrative (NCAT)) to assess whether a developer has provided buyers with sufficient justification for delays in construction or land registration. This would require legislative amendments to establish clear, objective criteria for assessment rather than relying on the broad 'just and equitable' test currently applied by the Supreme Court.

7. What events should be included in this definition?

See response to Question 6.

HIA does not support expanding the definition of a 'sunset event' to include additional prescribed events.

Restrictions on extending sunset dates | Limiting the duration of any extension prescribed circumstances Court approval

8. Should there be a limit on the developer's ability to extend sunset dates? If so, would this be best achieved by a cap on the number of extensions or a maximum period for any extension?

As with the responses to the previous proposals above, the question of whether there should be a limit on a developer's ability to extend sunset dates requires a careful balance between ensuring project feasibility and protecting buyers from undue delays or contract terminations.

Considerations for developers

Developers require a degree of flexibility in extending sunset dates due to unforeseen circumstances, such as construction delays, planning approvals, or supply chain disruptions. A rigid restriction on extensions could create unnecessary legal and financial complications, potentially leading to contract terminations that may not be in the best interests of either party. Allowing developers some discretion to extend sunset dates under prescribed conditions supports the overall viability of off-the-plan projects.

Third-Party Financier Considerations

Even if sunset date extensions are limited for developers, financiers as third parties might request extensions, which are beyond the developer's control. This additional layer of complexity should be factored

into any regulatory framework, ensuring that any limitations on extensions do not inadvertently create issues where developers are unable to meet contractual obligations due to financier-imposed delays.

Buyer Protections

Conversely, buyers should not be left vulnerable to indefinite delays that could result in financial strain, such as missing out on favourable market conditions or being forced into uncertain property transactions. Buyers often enter into off-the-plan contracts with expectations of completion within a reasonable timeframe. Excessive extensions to sunset dates could undermine consumer confidence and expose buyers to market fluctuations beyond their control.

Legal Advice and Buyer Awareness

Taking into account the above considerations, it is important to note that parties to the contract are at a liberty to negotiate the terms of the contract of sale. This includes negotiating whether the number of extensions can be capped and setting a maximum extension period.

To make an informed decision, buyers should carefully review contract terms and seek expert legal advice before signing.

Equally important is that buyers must obtain proper legal advice from lawyers specialising in this area to understand how to negotiate contract terms that best protect their interests. While some buyers might opt to engage conveyancers (due to lower costs) for assistance with off-the-plan purchases, off-the-plan contracts often involve complex clauses, legal risks, and potential disputes that require a higher level of legal expertise. This includes dealing with sunset date provisions and potential extensions. Without proper guidance, buyers may face financial and legal challenges they didn't anticipate.

<u>Property Lawyers v. Conveyancers</u>

1. Off-the-plan contracts are complex: These contracts often include sunset clauses, variations, and financing risks. Lawyers can interpret, negotiate, and amend contracts to protect buyers. Conveyancers can only explain terms and must refer clients to a lawyer for legal issues.

2. Legal protection in disputes: If a developer delays, changes plans, or terminates unfairly, buyers need legal support. Lawyers can negotiate, file legal claims, and seek compensation if needed. Conveyancers cannot represent buyers in court or handle legal disputes.

3. Contract amendments & negotiations: Lawyers can draft and modify contract terms to safeguard buyer rights. Conveyancers can only review existing contracts and cannot make legal amendments.

4. Tax, finance & compliance advice: Lawyers provide guidance on stamp duty, tax implications, and foreign investment rules. Conveyancers lack expertise in these areas, which could lead to unexpected costs for buyers.

9. Should the legislation set a maximum period by which a developer must settle an off the plan contract? If so, what should the maximum period be - for strata plans and for land developments?

See response to Question 8, noting that setting a mandatory time period may be too inflexible, as each development and project has unique requirements, including approvals and other factors.

10. Should the legislation limit the developer's ability to extend a sunset clause to only specific circumstances (e.g. adverse weather)? If so, what should those circumstances be?

While it is important to protect buyers from unnecessary delays, HIA reiterates that developers must also have the flexibility to extend sunset clauses in circumstances beyond their control. Construction projects are complex, and unexpected challenges can arise that make strict limitations on extensions impractical.

Allowing developers to extend sunset clauses in specific circumstances would help ensure projects are completed rather than cancelled, benefiting both developers and buyers. Such circumstances could include but not limited to:

- Adverse weather events that impact construction timelines (e.g., heavy rain, storms, or natural disasters).
- Supply chain disruptions that delay the delivery of essential materials due to factors outside the developer's control.
- Regulatory or planning approval delays where government agencies take longer than expected to issue permits.
- Industrial action affecting the construction workforce or key suppliers.
- Force majeure events, such as pandemics or economic disruptions, that make it temporarily unfeasible to continue construction.

As outlined earlier, HIA does not condone behaviour that would see a sunset date or delay event clause being used for inappropriate purposes. However, restricting extensions too tightly could result in more projects being terminated under sunset clauses, potentially leaving buyers without a property and facing higher market prices if they need to repurchase. Instead, a balanced approach, which allow extensions in genuine cases while requiring transparency and notice to buyers, would provide certainty while still accommodating real-world challenges.

11. If legislative caps are placed on the developer's ability to extend the sunset date, should the developer be able to seek approval of the Court to extend the sunset date? In what circumstances should this apply?

As outlined in the response to Question 6, HIA would support consideration of an independent body (excluding NCAT) to assess whether a developer has provided buyers with sufficient justification for delays in construction or land registration. This would require legislative amendments to establish clear, objective criteria for assessment rather than relying on the broad 'just and equitable' test currently applied by the Supreme Court.

Reasonable steps to meet sunset dates

12. Do you support a statutory requirement for developers to take reasonable steps to meet sunset dates, and to provide evidence of those steps to the buyer (and the Court) when seeking to extend sunset dates?

While developers should make reasonable efforts to meet sunset dates, imposing a statutory requirement to provide evidence of those steps could create an unnecessary compliance burden and increase costs, ultimately affecting housing affordability. Property development is subject to numerous external factors such as planning delays, supply chain issues, and workforce shortages, that may be outside a developer's

control.

Instead of strict statutory requirements, a more practical approach would be:

- Encouraging voluntary disclosure of progress updates to buyers.
- Allowing developers to provide general project timelines rather than detailed evidence for each delay.
- Recognising that developers are already financially incentivised to complete projects on time, as delays increase costs and impact profitability.

Equally important to address this proposal is as a first step, to understand further what constitutes 'reasonable steps' and what 'evidence' will be required to be provided to the buyer.

13. What mechanisms do you think could assist in compelling developers to perform obligations under the contract (eg penalty for non-compliance)?

Imposing penalties for non-compliance could be counterproductive, potentially discouraging investment in off-the-plan developments and increasing financial risks for developers. Instead, mechanisms should focus on incentivising project completion rather than punishing delays.

The importance of data/compelling evidence

Before introducing new laws that penalise developers for non-compliance, it is essential to assess whether the existing reforms have been effective. Any additional regulatory measures should be based on compelling evidence and data rather than assumptions about developer behaviour.

Since the introduction of previous reforms, there should be a clear analysis of whether the number of improper contract rescissions has increased, decreased, or remained stable. This data is crucial in determining whether further intervention is necessary and, if so, what form it should take.

Without such an assessment, there is a risk of over-regulating the industry (which is already heavily regulated), which could:

- Unfairly burden developers who are already operating within the law.
- Discourage investment in off-the-plan developments, reducing housing supply.
- Increase costs for future buyers as developers factor in additional risks and compliance obligations.

A transparent review of existing reforms which is backed by data would allow policymakers to make informed decisions, ensuring that any new measures effectively target bad faith conduct without stifling responsible development.

Any enforcement mechanisms should be proportionate and recognise that delays are often caused by external factors rather than developer negligence. A balanced approach will ensure that development remains viable while maintaining transparency for buyers.

Supreme Court to consider capital gain when assessing damages for recission

14. Are there circumstances where it would be appropriate for the Court to make an order permitting the vendor to rescind under a sunset clause but where an award of damages should include a component for capital

gain attributed to the vendor through rising land values?

15. Should s 66ZS be amended to allow the Court to consider capital gains as part of any claim for an award of damages?

In certain circumstances, it may be appropriate for the Supreme Court to consider capital gain when assessing damages for rescission under a sunset clause. However, this should only apply in cases where the developer has acted unfairly or in bad faith, such as deliberately delaying completion to take advantage of rising property values.

Developers face significant financial risks and rising costs due to factors such as inflation, material shortages, labour costs, and regulatory changes. These challenges can erode profit margins, even if land values increase. Automatically factoring in capital gain as a component of damages could unfairly penalise developers who are already facing external delays beyond their control (e.g., infrastructure bottlenecks, planning approval delays, or force majeure events).

A fair approach would be to allow courts to consider capital gain only in cases where:

- The developer has intentionally delayed completion to terminate the contract and resell at a higher price.
- There is clear evidence of bad faith or a pattern of similar behaviour by the developer.
- The rescission was not due to legitimate reasons, such as regulatory delays, financial viability concerns, or unavoidable disruptions.

Automatically awarding damages based on capital gain could set a risky precedent that discourages development, increases costs for future buyers, and reduces housing supply. Instead, courts should assess each case on its individual merits, ensuring a balanced approach that protects buyers from unfair practices while recognising the genuine risks and challenges developers face.

It is also important to recognise that good developers who act in good faith should not be 'punished' for the actions of a few bad actors. The majority of developers work within the law, aim to complete projects on time, and face genuine obstacles beyond their control. Applying a blanket approach to capital gain damages could discourage responsible development and increase costs for future buyers.

A balanced approach that targets bad faith behaviour while protecting developers acting in good faith is essential to maintaining confidence in off-the-plan property transactions and ensuring a stable housing supply (which HIA understands is the intention behind these reforms).

Notice of purchaser's contractual interest

16. Do you support a statutory requirement for developers to request that an off the plan contract notification be recorded on the development site?

HIA understands that the proposal put forward could involve the developer requesting that a Registrar General's caveat be recorded on title only once, after the first off-the-plan sale. If the developer does not request the recording of a caveat, buyers could be permitted to rescind their contract up until such time as the caveat is recorded.

The proposal also goes further providing that in the circumstance that the caveat is to be removed for any

other reason (like enabling a transfer), they would need to provide evidence to the Registrar General as to why the dealing must be registered or otherwise provide buyers' consent.

While transparency in off-the-plan purchases is important, a statutory requirement to record a contract notification on the development site may introduce unnecessary administrative burdens and practical challenges. Developers already operate within a regulated framework that ensures buyer protections, including disclosure requirements and statutory rights.

A mandatory notification system may not significantly enhance buyer protections but could create unintended complexities, such as difficulties in securing project financing or managing legitimate dealings on the land. A more balanced approach could involve an optional or developer-driven notification system rather than a blanket statutory requirement.

As a first step, HIA recommends a thorough assessment of whether this proposal could unduly impede development. It is important to consider that a caveat could prevent the registration of dealings that are ordinarily necessary in the development process. HIA would also require further clarity on how essential dealings (such as plans of subdivision, infrastructure leases, and mortgages) would be registered without disrupting the caveat.

17. Would this requirement add unreasonable cost or delay to the development process?

Yes, such a requirement could add both costs and delays to the development process. Developers frequently deal with lenders, contractors, and regulatory bodies, and imposing an additional registration step could create unnecessary red tape, leading to:

- Delays in project financing, as lenders may require additional approvals or reassurances.
- Increased administrative and legal costs, which could ultimately be passed on to buyers.
- Complications in land dealings, potentially restricting the developer's ability to adjust project plans or secure additional funding.

Instead of a mandatory notification, existing contractual protections (such as disclosure obligations, statutory sunset clause protections, and cooling-off periods) should be leveraged to ensure buyers are informed without adding excessive burdens to the development process.

18. What types of dealings and instruments should be prevented from being registered while an off the plan contract notification is in place?

If a notification system were introduced, any restrictions on dealings should be limited and carefully considered to avoid unintended consequences. Certain dealings are essential for project completion and should not be restricted, such as:

- Mortgages and financial instruments, which are necessary for funding the development.
- Subdivision registrations, which are required to create individual titles for purchasers.
- Easements and infrastructure agreements, which facilitate essential services (e.g., Sydney Water, electricity providers).

However, restrictions could apply to dealings that could undermine purchaser interests, such as:

- Unjustified transfers of the entire development site to another entity, particularly where it could affect contract validity.
- New encumbrances or dealings that significantly alter purchaser rights, unless necessary for project completion.

A balanced approach is needed to ensure that buyers' interests are protected while allowing legitimate transactions that support development progress.

Part B: Obsolete Restrictive Covenants

Executive Summary

HIA supports the proposal to provide more certainty for home buyers through reforms simplifying the process to remove obsolete covenants from land titles.

HIA acknowledges that restrictive covenants are often imposed by a developer at the time land is subdivided, but that they can become outdated and can act as an obstacle to future development.

Eliminating outdated restrictions that no longer service the public interest will enable more efficient and effective land use by removing unnecessary and outdated restrictions on development.

HIA's particular interest in covenants is that they sit outside of the planning system but can strongly impact decision making processes for homebuyers and people looking to build or renovate their homes. Covenants on the land title can create complex legal property law issues for homeowners looking to build or improve their homes.

HIA notes the invitation on page 5 of the Paper to provide comments on any other matter related to this topic. In response to this, we will also be commenting on the inconsistencies in how covenants are considered in the planning approvals process.

The key issues of concern for HIA are:

- The inconsistencies in the treatment of covenants within the NSW Planning System for development application (DA) approvals made by councils and complying development certificates (CDC) issued by councils and registered certifiers.
- The retention of outdated covenants on land titles relating for example to building materials, building design matters, and number of homes on title.
- Restrictive covenants placed on new land titles by local councils on registration of title using section 88B of the *Conveyancing Act 1919* (Conveyancing Act), to control building footprints, building setbacks, building materials and colour schemes.

In summary, HIA advocates for better alignment of the status of covenants between different planning approval pathways; better processes to remove unnecessary and obsolete covenants, and restrictions on the use of s88B of the Conveyancing Act. This submission addresses these matters in more detail.

Key Concerns and Recommendations

NSW Planning System & Covenants

The NSW Planning System has inconsistencies in how covenants are considered in the planning approvals process. This is explained in the NSW Government's Fact Sheet on Covenants and Complying Development. A copy of the Fact Sheet is **attached*** to this submission. These inconsistences can cause much confusion for homebuyers and homeowners looking to build or renovate their home.

The differences in how covenants are required to be considered by local councils in the DA approval process and by certifiers in the CDC approval process are outlined below.

Development Applications

Local councils can apply *Clause 1.9A* (c1.9A*) Suspension of covenants, agreements and instruments* set out within in their Local Environmental Plan (LEP) to over-ride a restrictive covenant. The clause specifies that:

"*For the purpose of enabling development on land in any zone to be carried out in accordance with this Plan or with a consent granted under the Act, any agreement, covenant or other similar instrument that restricts the carrying out of that development does not apply, to the extent necessary to serve that purpose.*"

A council can use c1.9A to approve a DA that does not comply with a covenant if the following occurs:

- The development application is made to the council for the development; and
- The LEP allows the council to approve the DA without complying with the covenant; and
- The council has development controls that deal with the subject matter of the covenant; and
- The council has assessed the application against the development controls and grants consent to the development.

Exceptions to c1.9A are any clauses applying to a covenant imposed by the council itself or those placed by the council in the interest of any public authority.

Complying Development Certificates

In contrast, most covenants that are restrictive in nature do apply to complying development under Clause 1.20 of *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP).

This means that a CDC must comply with the covenant as well as the normal standards for complying development. This includes covenants that are:

- Imposed by a council or required to be imposed by a council.
- Imposed by an owner or former owner of the land concerned.
- Specifically required by an environmental planning instrument (including an LEP)
- Imposed as a requirement of complying development with another law such as *Crown Management Act 2016, National Parks and Wildlife Act 1974, Nature Conservation Trust 2001, Native Vegetation Act 2003, Threatened Species Conservation Act 1995.*
- Imposed as a requirement to comply with another planning agreement.

The impact of the more onerous Codes SEPP covenant requirement is that proponents are forced to channel more planning applications through the council DA approvals pathway. This results in project assessments being taken out of the faster, more streamlined CDC approvals pathway, extending the time it takes to get an approval. This adds more costs for the proponent and places a greater burden on local councils already struggling to meet DA assessment timeframes.

HIA Recommendation: That the NSW planning legislation is amended so that DA and CDC approval pathways are consistent in their approach to the consideration of restrictive covenants, with the DA approval pathway becoming the standard.

Owner Imposed Covenants

HIA members report that outdated landowner-imposed covenants can impact development options for new dwellings, knock-down rebuild projects and home renovations. These covenants are sometimes placed on land titles at the point of subdivision, for estate planning reasons, to influence the style of new and future development.

Whilst these covenants sit outside of the planning system, they can impact building design and materials, and land-use of the site, creating complex planning approval and property law issues. Examples of these restrictive covenants and the impact on projects are provided in the following paragraphs.

During project planning for infill projects builders may see covenants on the land title specifying that the home must be built of brick and tile, and even that a particular architect or style of architecture must be used for design purposes.

A good example of the use of restrictive covenants for this purpose is the suburb of Rosebery, in South Sydney. The Rosebery Covenant was imposed at the time of subdivision in 1914 by the former owner of the land. The covenant limits the following:

- the materials of the front façade of the housing to brick or stone;
- the number of dwellings on the lot; and
- requires a dwelling to be limited to one-storey in height.

The covenant remains intact although in 2008, the City of Sydney resolved that the Rosebery Estate was not suitable for a heritage conservation area listing because the estate was too highly modified to constitute a conservation area.

Another example is for a property in Pennant Hills, where a covenant was placed on the land title over 50 years ago specifying that the building erected on the land "*shall be constructed of brick, or monocrete or both with roof of tiles and shall cost not less than £800*."

HIA recommends that that these covenants should be declared obsolete as they no longer reflect modern-day building and planning standards for the following reasons:

- Building materials may be appropriate at that time imposed, but they may no longer be compatible with the National Construction Code (NCC), NSW Building Sustainability Index (BASIX) and modern methods of construction.
- Over time design styles and preferences change to meet the needs of contemporary households, including multi-generational families or smaller households.
- The planning system allows and encourages in some settings the construction of dual occupancies and secondary dwellings on one lot to meet family needs and address housing affordability.

Restrictive covenants that are inconsistent with planning controls and development standards are problematic irrespective of the age of the allotment. They unnecessarily restrict development potential impacting housing supply and adding to the cost of housing. It undermines strategic planning processes and creates inconsistencies and confusion for councils, certifiers, builders, and property owners.

The ability for section 88B Instruments to impose development standards that are higher or inconsistent with the relevant planning instrument applying to the land should therefore be prevented.

- ***HIA supports the recommendation made in the discussion paper that all covenants placed on land titles at the point of subdivision for estate planning reasons automatically expire after 12 years.***
- ***Further HIA recommends that consideration be given to limiting the scope of restrictive covenants that can be imposed or required by any party, where they are inconsistent with planning controls and development standards that apply to the property.***

Council Imposed Covenants

There are many examples of local councils using section 88B of the Conveyancing Act to restrict building formats on development sites, beyond requirements in Environmental Planning Instruments (EPIs), such as LEPs and the CDC. For example, a council will impose as a condition of development consent for the subdivision that a covenant be included to restrict building footprints, setbacks, or construction materials, or to limit development options.

In some cases, the council may choose to do this to force the housing projects through the DA approval pathway, as the project cannot comply with CDC development standards. Whilst a local council cannot ignore a s88b restriction it can discuss work-around solutions with a DA proponent. This for example, could be a higher floor space ratio to meet the required building envelope/setback conditions.

There are also cases of section 88B covenants imposed that are unworkable for the proponent or the consent authority, be it the local council or certifier. HIA has been notified of a restriction on land in a new subdivision, placed by a south-western Sydney council, restricting roof colour palette to black. This restriction, dated November 2024, renders the development to be non-compliant with the requirements of NSW BASIX.

There are also examples of local councils using section 88B restrictions to prevent eave overhangs across maintenance easements, although the Code SEPP now permits this.

- ***HIA recommends that local councils should not be able to impose restrictive section 88B covenants on newly subdivided land that conflict with and are more onerous than legislated development standards in Environmental Planning Instruments.***

Covenants and complying development

Complying development that is carried out under *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* must comply with most kinds of restrictive covenant

Covenants are an agreement registered on the title of land

A covenant is an agreement that is registered on the title of a parcel of land. The covenant may restrict the way the land can be used or specify that the landowner must conduct a certain activity.

A covenant may be created during the sale of the land as it is transferred to the new owner, or by the registration on the land title under s88B of the *Conveyancing Act 1919*.

A covenant can be created by a developer, or between neighbours, or be required to be created by the conditions of a development consent from Council. The written terms of the covenant identify who benefits from the covenant and which landowner is burdened.

There are many different ways in which a covenant may restrict the use of land or require a landowner to conduct certain activities, including:

- restrictions on building within a certain building envelope or under a certain building height
- restrictions on using certain building materials or a requirement to use certain materials
- requirements to maintain stormwater devices, on site sewerage systems or boundary fences

Most restrictive covenants apply to complying development

Most covenants that are restrictive in nature apply to complying development under clause 1.20 of *State Environmental Planning Policy (Exempt and Complying Development Codes)* 2008.

This means that a complying development certificate must comply with the covenant as well as the normal development standards for complying development. This includes covenants that are:

- imposed by a council, or required to be imposed by a council
- imposed by an owner or former owner of the land concerned
- specifically required by an environmental planning instrument
- imposed as a requirement of complying with another law such as *Crown Management Act 2016, National Parks and Wildlife Act 1974, Nature Conservation Trust Act 2001, Native Vegetation Act 2003, Threaten Species Conservation Act 1995*
- imposed as a requirement to comply with another planning agreement

Some complying development may not need to comply with a covenant

In some cases, complying development may be carried out under a policy other than *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*. In these cases, the policy may say whether or not a covenant applies to complying development.

You should discuss your proposal with your certifier or local Council if your complying development is to be carried out under another policy.

In some cases, a Council may approve a development application that does not comply with a covenant

A covenant does not need to be complied with if:

- a development application is made to the Council for the development, and
- the Local Environmental Plan allows the Council to approve the development application without complying with the covenant, and
- the Council has development controls that deal with the subject matter of the covenant, and
- the Council has assessed the application against the development controls and grants consent to the development.

You should contact your local Council about your proposed development to discuss how it might deal with a particular covenant on your land in this way.

You can apply to extinguish an obsolete restrictive covenant

Under section 81A of the *Real Property Act 1900* you may apply to the Registrar General to extinguish a restrictive covenant where the restrictive covenant is more than 12 years old and it involves building materials, fencing or the value of structures.

Under section 81J of the *Real Property Act 1900* you may also apply to the Registrar General to extinguish another kind of restrictive covenant where:

- any time limit in the covenant as expired, or
- the land benefited and burdened by the covenant has been consolidated, or
- the covenant does not affect the land, or
- there is no specific land benefiting from the covenant, or
- the land benefiting from the covenant cannot be identified and the covenant was created before 1 July 1920, or
- the covenant has no practical value or application

https://rg-guidelines.nswlrs.com.au/land_dealings/dealing_requirements/covenants

This fact sheet is not legal advice

This fact sheet provides general information only and should not be relied upon when deciding to develop on land where a covenant is in place or in making a determination for a complying development certificate. Where in doubt, seek independent legal advice.